FLATHEAD CONTRACTORS, LLC,	)	**AGBCA Nos. 2005-130-1**
	)	**2005-131-1**
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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RULING OF THE BOARD OF CONTRACT APPEALS

January 18, 2006

BEFORE POLLACK, VERGILIO, and STEEL, Administrative Judges.[1]

Opinion by Administrative Judge POLLACK.

These appeals arise out of Contract No. 50-04R3-4-0002, Touchet Paving/Road 64, between Flathead Contractors, LLC (Flathead or Appellant) of Muskogee, Oklahoma and the U. S. Department of Agriculture, Forest Service (FS or Government), Umatilla National Forest, Walla Walla Ranger District, Walla Walla County, Washington. Under cover letter of May 19, 2005, the FS filed a Motion for Summary Judgment and Memorandum in Support (which, evidently in error, was titled in part Partial Summary Judgment) on the claims before the Board. The motion addresses Appellant's claim for adjustment in the number and in the unit price for additional stone in the rock retaining wall (a Designed Quantity (DQ) Item); for an adjustment in the Grading A material (also a DQ item); and for payment for crushing of shoulder rock used on the project.

[1] Administrative Judge Steel of the Interior Board of Contract Appeals, sits by designation.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACTS

1. The contract was awarded on the basis of a technical proposal and price. The Appellant had revised its initial technical proposal on June 8, 2004, to address concerns that had been raised by the FS as to the initial proposal. (Appeal File (AF) 96.)

2. The contract for $2,190,549.17 was awarded to Flathead on June 24, 2004, and called for reconstruction of 7.23 miles of double-lane road on Forest Road 6400 to the Touchet Corral trailhead/snowpark. Additionally, it included the exercised option of reconstructing approximately one-half mile of Forest Road 64-650. (AF 2, 5.) The project specified a 440-day duration; however, that duration took into account that due to other road uses, the contractor was not allowed to perform work between November 1 and April 1 (AF 8). Flathead was issued a Notice to Proceed (NTP) on July 6, 2004. It presented a construction schedule which called for completion of the work by October 29, 2004. (AF 26.) According to the FS, Flathead's operations were geared to this earlier date for completion. The FS stated that the date of actual completion was October 18, 2004. (AF 262; Appellant Supplemental Appeal File (SAF) 14).) In Appellant's letter of October 14, 2004, Appellant stated it was requesting final inspection on October 19, and said the only work remaining was installation of deliniators and completion of the shoulder rock and signs. (SAF 14).

3. The contract incorporated by reference the FS Standard Specifications for Construction of Roads and Bridges (NOV 1996) (AF 5).

4. Most of the contract work was priced as unit items, with only a few items being designated as lump sum. Several unit items were set out as DQ. Among the DQ items were bid item 252 (01), titled, Special Rock Embankment, Retaining Wall. This bid item called for a DQ of 872 cubic yards (cys), which Flathead priced at $91 cy. (AF 2-3, 5.)

5. Section 106.4 of that specification, titled Methods of Measurement, explains and deals with the use of DQ items, and is particularly pertinent to the Appellant's claim involving the rock wall. The Section provides:

> One of the following methods of measurement for determining final payment is DESIGNATED IN THE SCHEDULE OF ITEMS for each PAY ITEM.
>
> (a) Designed Quantity (DQ). These quantities denote the final number of units to be paid for under the terms of the contract. They are based upon the original design data available prior to advertising the project. Original design data include the preliminary survey information, design assumptions, calculations, drawings, and the presentation in the contract. Changes in the number of units DESIGNATED IN THE SCHEDULE OF ITEMS may be authorized under any of the following conditions.

> (1) Changes in the work authorized by the CO.
>
> (2) A determination by the CO that errors exist in the original design that cause a PAY ITEM quantity to change by 15 percent or more.

Regarding the above clause, the Government agrees that the Contracting Officer (CO) determined that there was a requisite error and quantity variation and therefore, as the FS understood the plain language of the clause, the CO was authorized to change the number of units and did so. The FS further noted that it understood the clause to limit the FS obligation to paying for quantities over the 15% variance and that quantities between the DQ and the 15% overrun were contractor's risk.

6. Several pay items were set out in the contract for road work. There was, however, no payment line item specified as shoulder rock in the road construction items.

7. Among the road work items specified, the contract included bid line item 304(10)A, Crushed Aggregate, Type Sub-Base, Grading A, Compaction C, DQ 8,287 cy and bid item 304(10)C, Crushed Aggregate, Type Base, Grading C, Compaction C, DQ of 19,435 cys, each of which Flathead priced at $16.67 per cy. The Grading A material is also a subject of claim. (AF 2-4.)

8. The standard Changes clause, FAR 52.243-4 (AF 17) was incorporated by reference and contained standard language as to 30 and 20 day notifications.

9. In presenting its Motion, the FS places particular emphasis on that portion of the provision, which states that the Contractor must submit proposals for equitable adjustment within 30 days of (1) receipt of contract modifications or (2) after giving notice for constructive changes to the CO. The FS also emphasized that provision of the clause which limits payment to those costs incurred 20 days prior to notice of the claim. (AF 157.)

10. The Appellant in early documents referenced the Variation in Estimated Quantity (VEQ) clause. The Appellant later dropped reliance on that clause. (AF 159.)

11. Under Section C-DESCRIPTION/SPECIFICATIONS/STATEMENT OF WORK, the contract incorporated at C-3 the provisions of AGAR 452.236-78, Forest Service Standard Specification for Construction of Roads and Bridges (NOV 1996). C-3 provided: "The Forest Service Standard Specifications for Construction of Roads and Bridges, August 1996 are included by reference. The requirements contained in these specifications are hereby made a part of this solicitation and any resultant contract." (AF 5.)

12. The following clause is relevant to the shoulder rock issue.

> 105.05 Rights in & Use of Materials Found or Produced on the Work

> (a) With the written approval of the CO, suitable stone, gravel, sand and other material found in the excavation can be used on the project. Payment will be made both for the excavation of such materials at the corresponding contract unit price and for pay items for which the excavated material is used. Replace, without additional compensation, sufficient suitable materials to complete the portion of the work that was originally contemplated to be constructed with such material
>
> (b) Materials produced or processed from Government lands in excess of the quantities **required for performance of this contract** are the property of the government. The government is not liable to make reimbursement for the cost of producing these materials. (Emphasis supplied)

13. The parties held a pre-work conference on July 2, 2004. The notes of the meeting indicated that the Government and Appellant discussed the furnishing, hauling and placing of shoulder rock. (Pre- Work Notes) (AF 151- 63.) Specifically the following was written in the notes: "Sheet 4, See general notes . . . Sheet 42, 304(B) Shoulder rock is in the pit. We'll estimate quantities and add in shoulder rock. 1st pile in pit on left. Test results back soon to see if it meets AC." (AF 163.) Later the notes say, "Crushed rock - base + sub-base. Contractor monitor compaction, FS will check. Daily crushing records - Deatley, subcontractor" (AF 164). Thereafter, the same notes provided, "Pit development - Once set up we'll discuss." (AF 164-65). The shoulder rock was later partially dealt with in Modification 1 (AF 168- 69).

14. By letter of July 6, 2004, the date of NTP, Mr. Mark Mann, Flathead's project manager, wrote to Mr. Joe Acosta, the CO's Representative (COR) and addressed various survey issues. The prior Saturday, Mr. Mann and the COR had viewed the project and quarry site and the letter reflected that on Mr. Mann's trip back from the FS office he re-evaluated an earlier estimate of shoulder rock, saying it should be close to 3,250 cys and not 6,500. (AF 170-71.)

15. By note of July 13, the CO, Marianne Klinger indicated she called Mr. Mann. She recorded "Explained mod." The remainder of her note indicated that Mr. Mann told her that Mark and Dave Freeman, "will evaluate and check quantities, then get back with a price." The Freemans were involved with the rock wall claim and it is therefore not clear as to whether they had involvement with the shoulder rock. (AF 177.) What is clear, however, is that from context, Ms. Klinger was explaining Modification 1. The draft of Modification 1 shows an effective date of July 9, 2004, and says:

> This modification adds item 304(14)A.1 Placing aggregate, Compaction B, CY in a Hauling Vehicle, for shoulder rock on road 64 and road 650, Adds item 203(03).1 Excavation, placement method 3, to road 64 to change the ditch slope ratio through the snowpark section from 1:1 to 1:2 to match sheets 4-5 of 44 lists a number of items and adds 304(14)A .1.
>
> Rd. 64304(14)A.1 2661.367 cy X $ _____ 203(03).1 5934 cy X $_____

Rd. 650304(14)A.1 665.342 cy X $ _____

16. By letter of July 21, Mr. Mann addressed "Vertical Profile Changes" in the rock wall height, which would cause it to exceed 8 feet. It is not clear from the record how this affects the retaining wall claim, but it does appear to relate to the Appellant argument that the additional quantity was the result of a change and not overrun. (SAF 2-3.) Appellant's letter of July 26, reflects the need to resolve some design problems affecting Freeman (SAF 9). During this same time frame, there were additional letters talking about using a geogrid solution for the retaining wall (SAF 9-13).

17. The Appellant's crushing subcontractor mobilized on August 3, aggregate crushing began on August 9, and the subcontractor completed the crushing on August 16. The crusher was demobilized on August 24. At the time of demobilization, there was crushed material, which had not yet been used on the contract and was perceived by the FS as excess that would remain after the project was complete. (AF 262-72.)

18. As of August 4, 2004, the parties had discussed the need for added shoulder rock, but had not agreed to a final price. In addition, there was a statement that the quantity increased at the pit. (AF 184.) A final Modification 1 was signed by the Government on August 19 and signed by the contractor on August 21. The modification carried an effective date of August 9, 2004. Prior to Modification 1 there was no line item 304 (14), for shoulder rock. (AF 179.)

19. On September 10, 2004, Appellant wrote to the COR. Among the items referenced was Appellant's proposal for shoulder rock and additional quantity of special rock embankment retaining wall above design quantity. As to shoulder rock the letter provided:

> You previously requested a price for placing shoulder rock and we agreed to establish a unit price based on truck yard measure to eliminate the need for contingency quantities. Our estimate for quantity is approximately 3,500 cubic yards (in hauling vehicle). Our cost proposal based on government furnished material is $8.15/c.y. for hauling and placing.

(AF 189.)

20. The letter then went on to address the retaining wall.

> There has also been an overrun on Special Rock Embankment Retaining Wall. The stone used for this wall has a unit weight of 5,000 lbs. per solid cubic yard. To date, Ron Wilson has informed me they have delivered and placed over 2,700 tons. Based on solid in place quantity, this would equate to 1,080 cubic yards. Installation would also involve some voids, so it is likely that the actual quantity is higher than 1,080. Our survey crew will be onsite next week to set sub-grade hubs and they could assist you in measuring the wall at that time or we could calculate the neat line quantity from the actual slope catches at the face of wall from the CAD file.

> If you have any questions or need additional information regarding the above quantities or prices, please advise. (AF 189-90)

21. On September 13, Ms. Klinger and Mr. Mann held a telephone conversation. Her notes provide:

> Quantity overrun on the wall rock
> Conversion was quite a bit less than what he really originally estimated
> $30/ton is what he's paying.

(AF 191.)

22. On September 14, Flathead provided a price for shoulder rock (AF 197). There is no indication in that pricing document as to whether that rock was coming from the Government pit or an alternate source, although it appears the parties were still talking about the Government pit.

23. According to Flathead, the parties discussed the need for a unit price increase for the overrun wall quantity. Appellant also says in its response to the Government motion that it will show by testimony that the predecessor CO agreed to consider a change in unit price, at which time the extent of the quantity overrun could be determined. (page (p.) 3; Appellant's Response (A-Resp.) This allegedly occurred during negotiations on Modification 2 (AF 142). The earlier referenced notes of Ms. Klinger (AF 191) are consistent with the Appellant's contention that the FS was aware of a potential or actual claim for additional quantity and amount. Nothing in the notes or documents reflects an agreement on price.

24. Modification 2 was dated effective September 14. The Government and contractor signed it on September 16. Prior to the FS entering into Modification 2, the FS prepared a "Justification," dated August 9, 2004. There it stated that the modification added shoulder rock to both the 64 and the 650 roads. It said that shoulder rock was shown on the drawings, but was omitted from the schedule of items. It said the rock was needed for safety purposes. In addition, the modification addressed other items, which the parties do not identify as relevant to this motion. (AF 142.)

25. In September, the Appellant was placing aggregate and on October 11, it began hauling and placing of aggregate C as shoulder rock. It finished that hauling and placement on October 14. During this time frame, Ms. Klinger left her position as CO and on October 1, designated Carl Culham to that position. (AF 201-03.)

26. On November 4, 2004, Mr. Acosta wrote to Mr. Mann and said, "this is a followup to our discussion on the payrolls and modification number three that will address the outstanding work orders and final quantities for the shoulder rock and retaining wall." He stated that the difference in quantities as to retaining wall was 872 cys and that the FS had measured 1,375 cys, as contrasted with the contractor measurement of 1,552. He then listed the actual quantities for shoulder rock at Rd 64, as 4,990 cys and at Rd. 650 as 310 cys. That compared to contract quantities added by

modification of Rd. 64 at 2,835 cys and Rd. 650 at 665 cys. He then calculated $8.15 x 1,800 for a total of $14,670 (AF 205.)

27. In an e-mail from Mr. Mann to the COR dated November 10, Mr. Mann stated that after reviewing final costs:

> I know Dave had a lot more cost than we have been able to pay associated with the wall, since that quantity overran significantly as well as his unit costs. I am finally getting to see the top of my desk and will have a letter to you by Friday to address the extra cost on the wall.

(SAF 39.) Dave was Dave Freeman, the subcontractor who worked on the retaining wall.

28. On November 17, Mr. Mann again wrote to the COR as to the retaining wall and said that after reviewing the final quantities for the project, there were a few items with which the parties differed as to final quantities. He further said that, as had been previously discussed by the parties, the overrun in the retaining wall quantity had caused Flathead's subcontractor, Freeman Contracting, to incur a significant cost impact. He continued that he had discussed this issue with Ms. Klinger at the time they were negotiating the cost reduction on the excavation and culvert items. He said that after reviewing Flathead's subcontract's final costs, Flathead was requesting a $15/cy increase for the unit price on the overrun quantity. He said the increase covered Flathead's subcontractor's cost overrun on the additional quantity and did not include additional mark-up on the prime contract. (AF 206-07.)

29. Mr. Mann then addressed the shoulder rock and said,

> The shoulder rock item also overran the estimated quantity, which of course is paid on actual quantity. However this change order was specified as Government furnished aggregate and the material used was furnished by the contractor. It was originally anticipated to use the existing government stockpile of material at the quarry, which I estimated to be less than 2,500 cys. However, I understand that due to the wet condition during the time the material was placed, a decision was made to use the remaining stockpile of Grading C. I recognize that this was done for the benefit of both the government and the contractor and accordingly, I believe it is reasonable to recognize that we could have used the government furnished material up to the quantity available. However, I also believe that we should recover the material cost on the quantity that exceeded the government furnished aggregate. If this is agreeable, our unit cost for Grading C comes to $6.95/cy in the hauling vehicle." (AF 206-07.)

30. The COR responded by letter of November 24, 2004. He first addressed the retaining wall and said that since the item was a design quantity, Section 106.04 of the FS specifications only provides for increases in quantities not in price. He also stated that because there was no change

in the type of work, only an increase in materials above 15% is allowed, the contract price remains the same. He pointed out that the total quantity he calculated was 1,538 cys which subtracted 13 cys from his quantities, since the Road 700 junction was not shown. Therefore, he allowed an adjustment of 536 cys, at $91 a cy. (AF 208-09.)

31. In addition, the COR addressed the shoulder rock:

> Since the work for base and surface had been completed, including item 304(10)C, when the shoulder rock work began, it made sense to use the remaining stockpile grading C first, otherwise the material would just remain as overproduced material in a stockpile as Forest Service property per section 105.05 of the Forest Service specifications. However, there was an overrun in the actual quantities therefore the adjustment is for an additional 1,800 cubic yards at $8.15/cy for a total of $14,670.

(AF 208-09.)

32. Flathead wrote back by letter of November 29, 2004. Mr. Mann said he thought the variation in quantities clause applied to the retaining wall rock. He said that the increase in the quantity had a significant cost impact on Flathead's subcontractor and pointed out that one impact was the additional quantity of Grade A required to perform this work, which was not paid under the DQ for that item. He continued that there were also other contributing cost impacts associated with the additional time necessary to complete this work, such as overtime costs associated with the excavation and other work that could not be completed until the wall was constructed but necessary to complete the work on schedule. He then concluded, "Clearly I believe there is an equitable adjustment due our subcontractor, over and above the increased quantity that we do agree on." (AF 210-11.)

33. Mr. Mann then addressed the shoulder rock. He reiterated that all agreed it was the most reasonable to use the remaining Grade C for shoulder rock and again, he believed this was done for both convenience of the Government and contractor. He stated that the material was much cleaner than the existing Government stockpile of aggregate, which was wet and muddy due to extensive rains. He said the change order modification for shoulder rock was for hauling and placing government furnished material and continued, "I believe we can both recognize that there was not sufficient quantity of government furnished material stockpiled on site, regardless as to whether it was used as shoulder rock or not. In your letter, you refer to Spec Sec 105.05 and note that the unused material would otherwise remain the property of the Forest Service. I believe you are referring specifically to section 105.05(b) which reads as follows:

> (b) Materials produced or processed from Government lands in excess of the quantities required for performance of this contract are the property of the Government. The Government is not obligated to make reimbursement for the cost of producing these materials.

(AF 210-11.)

34. He then said, "While I would agree that any unused material would remain the property of the Government and therefore not subject to reimbursement, this refers to materials produced in excess of the quantities required for performance of this contract. Clearly the entire quantity of shoulder rock came from the materials we produced for this contract and used for the performance of this contract. However, a portion of this work could have been performed using the existing Government stockpile and I believe it is reasonable to recognize that quantity as Government furnished. The Government received the benefit of the additional materials we produced for this contract and I believe it is clearly the intent of the Specifications that the contractor should be reimbursed for the cost of producing this material." (AF 210-11.)

35. The COR e-mailed Appellant on December 1, in response to the above, and stated that he had discussed the earlier letter with the CO and they agreed that parties should discuss issues. (AF 212; SAF 41.)

36. Thereafter, Mr. Culham, the CO, prepared a memo to the file dated December 13, 2004. There he reiterated that Flathead made the case that the overage should apply to change in unit price per variation in estimated quantity and Mr. Culham additionally stated that Mr. Mann had pointed out problems in Flathead's initial estimating. Mr. Culham then stated that Mr. Mann should have brought that problem to the CO's attention at that time. He also noted that Mr. Mann provided that the prior CO had indicated a different approach for the overage, along with the fact that the contract had been changed in other areas to allow for a price change for a DQ item. Mr. Culham said, for the latter, "the change was due to work requirements, thereby allowing for price to be discussed." As to the position taken by Ms. Klinger, Mr. Culham provided that he was the CO of record and therefore would make the call on the matter. He said there was no meeting of minds. (AF 213-14.)

37. Mr. Culham then continued and addressed Flathead's argument that Flathead should be paid for the costs of crushing the rock used on the shoulder. He stated that the original item (evidently referring to the modification) called for placement of Government owned material and thus the modification price was limited solely to placement costs, with no cost for materials. He then acknowledged that the Government source was found to contain less than the needed material and was of minimal quality. Based on those facts, the Government agreed that surplus material used in crushing operations for the asphalt work would be used for the shoulder rock. Mr. Culham then explained that as the rock was surplus to the crushing operation, it was the Government's property pursuant to the specification for crushing. He said that Mr. Mann's interpretation of the specification was that as the rock was used in the work, the contractor should be paid for it. Mr. Culham said that pursuant to discussions, he had agreed that if all issues related to the contract were agreed to be satisfied, then the following adjustments would be made under the variation in quantity clause. The FS would pay for 3,260 cys at the contract price of $8.15 and 2,040 cys at $15.10. ($8.15 plus $6.95 for crushing). He concluded that if that could not be agreed to, then he would disallow adjustment for both items (shoulder rock and retaining wall) and let Flathead pursue the claims process. (AF 214.)

38. On December 17, Flathead rejected the FS settlement offer (AF 217). Thereafter, the FS finalized Modification 3 as to those items for which there was agreement. Flathead, when it returned Modification 3, deleted the accord and satisfaction language on the modification, because of its concerns that the additional items might be found to be included in the Modification. (AF 253, 255.) Modification 3 was dated effective December 15, and signed by the Contractor and Government on December 17, 2004. (AF 144, 204-05; SAF 36.)

39. By letter of January 4, 2005, (AF 218-19), Flathead followed up a telephone conversation of December 17 and asked the CO for a final decision (AF 217). In quantifying the matter, Flathead said that the retaining wall rock exceeded the designated DQ by 176% and the actual quantity came to 1,538 cys of which the FS agreed to pay only the amount over 115% and that, at the unit price bid. Mr. Mann said that with the FS paying for the over 115%, the difference was an additional 131 cys, which at $91 a cy totaled $11,921. In addition, Appellant said it was requesting additional equitable adjustment for its subcontractor for quantity over 115%, using the estimated quantities clause. Additionally, Appellant asked for a separate increase in Aggregate Base Grading A.

40. Appellant then turned to the shoulder rock modification, which Mr. Mann said was based on Government furnished material for an estimated quantity of 3,500 cys in the hauling vehicle. The shoulder rock claim was for furnishing the aggregate for the shoulder rock from the stockpile of material crushed for the instant contract. Appellant stated that it recognized that the government had a stockpile of material available (2,500 cys) and said it was reasonable to allow a credit for that quantity, as government furnished. Appellant then calculated the actual quantity of 5,300 cys, which it said was used, less credit for 2,500 cys in the stockpile. It claimed its rate (taking into account crushing costs and other adjustments) was $8.56 a cy, which it multiplied by 2,800 cys, for a total of $23,968 (AF 218-19.)

41. On January 13, Mr. Mann wrote again, saying that he had researched Board decisions and discovered that some of his conclusions were not consistent with decisions and amendments. He abandoned the variation in quantities argument and cited a Board case, J&D Services of Northern Minnesota, Inc. AGBCA No. 98-126-1, 99-2 ¶ 30, 478 for the proposition that recovery was not limited to only that over 15%. He further stated that J&D did not support the FS claimed non-increase in dollars. He asserted that the actual cost was the right adjustment number and said his subcontractor's actual cost was more than $91. He said the increase should apply to entire quantity of overrun of 666 cys, of which 535 cys had been paid at the original unit price. He adjusted the subcontractor claim for impacts relating to overtime and equipment standby due to increase in wall quantity and additional time to complete the work. He then set out his calculations. (AF 220-22.)

42. On January 25, 2005, the CO issued his final decision (AF 223). He acknowledged the contractor's reliance on J&D, but noted that he believed the Board had missed an important clarification regarding contractor reliance. The CO asserted that there are two bases for reliance, not just one when it comes to a DQ item. He said that when reading the quantity together with the requirement in Section 106.04, it was his view that when Appellant entered into the contract to provide Special Rock, the Appellant had agreed to provide up to 114.9% of the DQ for payment of

100% of the stated DQ of 872 cys as provided in Section 106.4. He continued that the contractor in formulating a price strategy is left on his or her own to take the 115% proviso into consideration or not when pricing a contract. (AF 224.) He then denied the claim for impact on other work as to 304(10)A, citing Big Sky Contractors, Inc., AGBCA No. 1999-190-2 (decided under the Board's Expedited procedure and thus not precedential). He said that a review of contract performance showed that an authorized change did not occur to item 304(10)A and he calculated the overrun at 14.8%. He essentially repeated the position he had taken throughout his time as CO in regards to the shoulder rock claim.

43. On February 1, 2005, Appellant wrote to the CO in response to the decision. The first item he addressed was 304(10)A. As to that item, Appellant essentially agreed that if the item was under 115% (as noted above, the CO thought it was 14.8%), then it would not be payable. However Appellant then described an added quantity, which it considered bumped the overrun to over 115%. Appellant then turned to the shoulder rock issue and stated the facts set out by the CO did not represent actual discussions that took place during negotiations of the change order to place the shoulder rock. He attributed the error to CO's late involvement on the project. He first pointed out that the Chase Mountain Pit was identified as a government source for rock production, but was not a "designated source," meaning its use was not a contract requirement. He said that he had been told by the COR that the bid item for shoulder rock had been inadvertently left out of the bid schedule and the parties would need to negotiate a price for that work. Appellant pointed out that at that time the parties needed to come up with a quantity, so Appellant could include the aggregate in the final crushing production. At that time the COR said the estimate was 2,500 cys and then showed Appellant a stockpile of material that had been left from a prior job. The COR informed him that this stockpile would be designated as the Government furnished material for shoulder rock.

44. Appellant continued that at the time he paced off the stockpile, he informed COR that he did not think the stockpile contained 2,500 cys and further that he was not sure that 2,500 cys would be sufficient to complete the rock shoulder work. He said that he also discussed using some of the crusher reject, if it would later be acceptable during rock production. Appellant then states that he and the COR agreed that the quantity would reasonably be around 3,500 cys and at the time, it was too early to know if it would be sufficient. Appellant then stated, "Still we recognized that the existing stockpile would likely not be sufficient and I mentioned that the crusher reject may be an option, but that I expected the government should pay a reasonable price for the material. We agreed to this option and I was also aware that the government had additional aggregate material near the project." The Appellant then went on to say that due to the uncertainty of the quantity required and difficulty of in place measurement, Appellant submitted a written proposal to haul and place the government furnished shoulder rock. Modification 2 was for 3,500 cys which would eventually be less than the final quantity needed, which was approximately 5,300 cys. No modification had addressed the 1,800 additional cys, although the quantity was agreed to.

45. Appellant then addressed some statements the CO made as to the crushing operation, taking exception to the CO's statement that Appellant had agreed that ownership of the material (the surplus crushed rock) was acknowledged to be that of the Government, pursuant to Section 105.05.

Appellant said that it did not acknowledge that at the time, since there was no determination that surplus material existed until the work specifying the material was completed. Mr. Mann also emphasized that the wording "required for performance of the contract" was key, noting that when it was eventually determined that there was excess aggregate, that excess aggregate was used for performance of the contract. Additionally, Appellant clarified that the position was not a new position, but it had always been Appellant's position that costs for crushing rock should be allowed, in the event that rock used from Flathead's production was used for extra work, including shoulder rock or other items of work requiring aggregate. He further stated that in fact, where surplus rock was used on other change-directed work, full payment of the Item 204(10)C Aggregate Base Grading C was made and authorized by modification. This item included payment for furnishing the material in place, including the cost of production. (AF 239-41.)

46. Finally, Mr. Mann said that he was unaware, despite the CO's statement to the contrary, that it was never the intent of the Government to have shoulder rock crushed for the work. He said that perhaps at the time the modification was negotiated and at a point where the FS anticipated sufficient rock could be produced, that might have been the case. He then noted, "but that does not assume the contractor would not get paid for production, if needed." He then closed by addressing other issues such as the method and economies of rock crushing and how the crushing process works and how material was paid on this contract. (AF 241.)

47. Thereafter, several other communications were exchanged, but they generally add nothing to our consideration of the motion. In a February 7, 2005 letter, the Appellant laid out its costs and claim, which totaled $52,804. (AF 243-44, 247, 249, 252-53.) On February 7, Appellant filed its appeal.

48. On May 19, 2005, the FS filed its Motion for Summary Judgment. As to the rock wall it says at p. 14, that the design error resulted in an increased quantity of rock used in the wall, not a change to the wall. It said that where changes did occur, such as when the parties agreed to install "geogrid' with an additional Aggregate A, or when costs for hauling shoulder rock was needed, the parties negotiated a price and method of calculation and executed a modification.

DISCUSSION

SUMMARY JUDGMENT STANDARD

Summary judgment is to be used when there are no material disputes over the controlling facts and the decision before the tribunal is one of assessing and applying the law. As the Government properly points out, summary judgment is appropriate where no material facts are in dispute and the moving party is entitled to judgment as a matter of law. Santee Modular Homes, Inc., AGBCA No. 95-220-1, 96-2 BCA ¶ 28,432. On a number of issues here, the FS position rests upon argued facts, which have not been agreed to by Appellant. At other times, the FS argues that Appellant has not proven its case nor adequately supported its allegations. A summary judgment proceeding is not a proceeding where a party is expected to fully lay out his/her case. Summary judgement is not the time to weigh

competing evidence. Here, notwithstanding the FS arguments to the contrary, Appellant has provided in its filings and letters sufficient factual basis to support its claims at this stage of the proceeding. Accordingly, granting the FS motion is not justified.

CHANGES TO CLAIM

The FS spends several pages in its brief arguing that the Board should not condone or support what it describes as multiple changes to Appellant's claims during the project. The FS does not argue accord and satisfaction but rather argues that we should not countenance what it calls post hoc rationalizations of the claim. The arguments put forth by the FS in these respects are not an appropriate basis for granting summary judgment and merit no further comment.

TIMELINESS OF CLAIMS

The FS asserts the Appellant's claim for the rock wall should be time barred because Appellant did not submit its claim for the retaining wall within 30 days of completion of that work, as the FS says is required by the Changes clause. The FS further contends that even if Appellant's claim was submitted within 30 days of road completion, the Changes clause only allows for payment for work completed within 20 days of the claim; and, Appellant had no costs for the claim during that prior 20-day period.

In its motion and supporting arguments, the FS cites no case law in support of enforcement of the time frames set out in the Changes clause, but rather relies on its understanding of the language. The FS does not address the fact that established case law and precedent have established that the time frames are not to be applied to time bar a claim in most instances. Decisions of various boards and courts have made it clear that the 30 and 20 day time frames in the Changes clause, such as those in issue here, are not generally enforced, but for special circumstances, none of which have been alleged or established here and which from the record we have, appear not to be present. In this appeal, the records show that the FS was aware of a claim for additional quantities, relating to the rock wall, well before the dates relied on by the FS for its timeliness claim. The FS may not have had the details, but it was aware of the fact that Appellant was seeking additional payment.

The law is settled that generally courts and Boards do not bar a claim for failure to comply with contractually required notice provisions absent a showing that the Government has been prejudiced by lack of the notice. Even then, overwhelming precedent favors the imposition of a higher burden of persuasion upon the contractor rather than outright denial of the claim. There have been some limited situations where the claim is first introduced well after final payment or when some clear and significant prejudice has been shown. None of those situations have been identified on the current record before us.

In Hoel-Steffen Construction, Co. v. United States, 456 F. 2d 760 (Ct. Cl. 1972), which remains good law, the court stated:

> To adopt [a] severe and narrow application of the notice requirements . . . would be out of tune with the language and purpose of the notice provisions, as well as with this court's wholesome concern that notice provisions in contract-adjustment clauses not be applied too technically and illiberally where the government is quite aware of the operative facts.

The conclusion in Hoel-Steffen as to enforcement of the time limits in the changes clause has been upheld and reiterated in numerous cases. See Mingus Construction Company v. United States , 812 F.2d 1287, 1392 (Fed. Cir. 1987); Big Chief Drilling Company v. United States, 15 Cl. Ct. 295 (1988); Schouten Construction, DOT CAB 77-4, 79-1 BCA ¶ 13,630; Husman Brothers, Inc., DOT CAB 71-15, 73-1 BCA ¶ 9889; R.P. Richards Construction, Inc., DOT CAB 4019, 4032, 4048, 01-2 BCA ¶ 31,594; B.L.I. Construction Co., ASBCA No. 45560, 94-1 BCA ¶ 26,308; Central Mechanical Construction; ASBCA Nos. 29431 et al, 85-2 BCA ¶ 18,061; Ball, Ball & Brosamer, Inc., IBCA No. 2841, 97-1 BCA ¶ 28,897.

In Big Chief Drilling, the Court of Federal Claims stated:

> The clearly established law on notice requirements provides that "a contractor's failure to adhere to the notice requirements of a contract clause can result in claim presented pursuant to such clause being disallowed." H.H.O. Co., 12 Cl. Ct. at 164 (citing Jo-Bar Mfg., Corp.v. United States, 210 Ct. Cl. 149, 156-57, 535 F. 2d 62, 66 (1976); Eggers & Higgins v. United States, 185 Ct. Cl. 765, 785, 403 F. 2d 225, 236 (1968); Specialty Assembling & Packing Co. v. United States, 174 Ct. Cl. 153, 179-80, 335 F.2d 554, 570 (1966), see also Mingus Constructors, Inc. v. United States, 10 Cl. Ct. 173, aff'd 812 F.2d 1387 (Fed. Cir. 1987).
>
> In order to prevail in a case in which notice has not been provided on a timely basis, by the contractor, the government has the burden of proving that the untimeliness caused the prejudice to its case. H.H.O. Co. 12 Cl. Ct. at 164, Gulf Western Industries v. United States, 6 Cl. Ct. 742, 755 (1984).

Here we have no showing of prejudice, which would justify denying the claims. Moreover, the record clearly shows that the FS was aware of Appellant's claims for additional costs on the rock wall and Grade A material, well before the November 17, 2004 letter, which the FS relies upon. There are a number of pieces of correspondence, including those dated September 13, November 10 and November 14 that address a claim as to the retaining wall rock.

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OBLIGATIONS OF FS AS TO DQ ITEM OVERRUNS

The clause dealing with adjustments to Designated Quantities provides as follows.

> 106.4 Methods of Measurement

> One of the following methods of measurement for determining final payment is DESIGNATED IN THE SCHEDULE OF ITEMS for each PAY ITEM.
>
> (a) Designed Quantity (DQ) These quantities denote the final number of units to be paid for under the terms of the contract. They are based upon the original design data available prior to advertising the project. Original design data include the preliminary survey information, design assumptions , calculations, drawings, and the presentation in the contract. Change in the number of units DESIGNATED IN THE SCHEDULE OF ITEMS may be authorized under any of the following conditions.
>
> (1) Changes in the work authorized by the CO
>
> (2) A determination by the CO that errors exist in the original design that cause a PAY ITEM quantity to change by 15 percent or more.

The FS concedes there was a design error and as a result, the amount of stone needed for the wall exceeded the DQ of stone needed for the retaining wall. The FS further agrees that it was obligated to pay for the quantity that exceeded 115% of the DQ and pay it at the unit price bid. Appellant asserts that in addition to payment for the overrun above 115%, it is entitled to be paid for the amount between the DQ and 115%; and additionally, Appellant claims it is entitled to an adjustment in the unit price for that quantity as well as an adjustment in the unit price for the quantity already paid. Appellant has also argued that the additional quantity was caused by a CO change and not a design error in the DQ.

The Government says the contract language can only be interpreted to allow payment for the overrun which exceeds 115% and asserts that the quantity between the amount designated on the bid schedule and 115% is part of Appellant's bid risk and is therefore not compensable. The FS also states that payment for the quantity over 115% is limited to the unit price bid and is not subject to adjustment.

As presented by the FS, the retaining wall quantity dispute centers on contract interpretation. It raises issues such as the plain meaning of the measurement clause and whether the language is clear or susceptible to more than one possibly reasonable interpretation. While we understand the respective readings given the language by the parties, what is clear is that the language can be read in more than one manner. When that is the case, as we find here, we need to look at extrinsic evidence, such as, but not limited to the surrounding circumstances, how the clause was interpreted or treated during the contract, and whether and how the clause was applied elsewhere. We further need to weigh the competing claims of reasonableness. When we look at such matters in relation to the designated quantity dispute and look at the language of the clause, it is evident that the wording does not expressly state what the FS claims is the clear and only possible meaning. While the clause is quite clear that where there is an error and the overrun does not exceed 15%, a party is to receive no compensation for an overrun in a designated quantity. The clause is not so clear as to what happens once the 115% is exceeded. The clause does not explicitly address how the material between the DQ and the overrun of 115% is to be treated in that situation, nor how it is to be priced.

We could draw some conclusions from the language and from some of the dealings between the parties. But any such conclusions would not be based on absolutes but would rather require us to apply various inferences and weigh various matters such as reasonableness in the context of the work involved. Since this matter is before us on summary judgment, we are to take all inferences in favor of the non-moving party. Doing that, we cannot find in favor of the FS on summary judgment.

Put simply, on the record before us at this point, the meaning of the disputed language is at a minimum arguably ambiguous and not clear as to the disputed items. As such, we need a more developed record to explain the clause and its use by the parties and then weigh the evidence. On the record before us, if we apply all reasonable inferences in favor of Appellant, the language could be understood such that once the 115% is exceeded, a party is entitled to compensation for the entire overrun. Not applying such inferences, and looking at matters in favor of the FS interpretation, we could also conclude that since one would not be paid for the overrun if it did not exceed 115%, then to allow payment for all, simply because the 115% has been exceeded, could arguably constitute a windfall. Further development of the record will either enhance or undermine the parties' competing interpretations.

In addition, Appellant has put on the table that the prior CO had indicated a different approach for the overage and that the contract had been changed in other areas to allow for a price change for at least one DQ item. While, Mr. Culham responded by explaining, the "latter change was due to work requirements, thereby allowing for price to be discussed," and that he was now the CO of record and therefore would make the call on the matter, notwithstanding the position of his predecessor; that does not change the fact that Appellant might be able to use the above to buttress the reasonableness and application of its reading. The position of the prior CO as to this language and the actions of the FS in interpreting the clause in another instance, clearly go to the question of the reasonableness and potential course of dealing or concurrent interpretation. This further militates against granting the FS motion.

Finally, in its Rebuttal to the FS Reply to Appellant's Response, the Appellant seems to argue that the additional stone material was the result of a change and not due to an overrun under Section 106.05. This also follows as to the Grade A material. In fact Appellant has asserted the rock wall changes were due to a defective specification and as such were not necessarily an error in estimating the quantity. Without developing that further, we do note that Appellant contends at p. 5 of its Reply to the Motion that the wall as constructed is not what was called for in the solicitation. It states, "The errors that existed in the original design were beyond what can be called a simple overrun in quantity. Additionally, there were changes that affected the wall beyond the addition of geogrid and had these changes not been engineered during construction, the wall quantity would have increased substantially over the final 176%."

GRADE A AGGREGATE

The FS has refused the claimed additional compensation on this item because the FS has calculated that the overrun for this DQ was 14.8% and thus Appellant did not meet the 15% threshold.

Appellant asserts a recalculation of the quantity which it says increases the amount over 15%. In asking the Board to grant summary judgement on this part of the claim, the FS asserts that Appellant came to its figure by using new math that based the overrun variance not on contract line items, but on Flathead's designated use of a portion of the materials. The FS then continues on for two additional paragraphs of explanation.

This matter is before us on summary judgment. The argument and facts cited by the FS are not agreed to by Appellant. The FS is asking the Board to make an analysis of facts on the current record. Again, it wants the Board to analyze the evidence and weigh it. That is premature. The Board understands the FS argument as to the 15% and its legal affect, should the FS be correct in its interpretation of how a DQ item is to be compensated. However, the nature of the FS argument on this issue, which raises questions as to how Appellant calculated its number over 15% and whether that is appropriate goes well beyond contract interpretation. Moreover, as we stated in relation to the rock retaining wall stone, the clause itself is not as clear as the FS claims. The legal and factual questions as to the meaning of the DQ clause has been discussed above in relation to the rock wall. Therefore, it need not be repeated here. Accordingly, we deny the FS motion on this issue.

Moreover, the record as currently developed does not make clear exactly why the material was added. Flathead has made several references to defective specifications, but has not developed those arguments. However, Flathead is not required at this point to prove its case. Rather, it is simply defending a FS motion for summary judgment. The fact that the increase may fall under a different category, may be the result of a change, and not an overrun, makes us reluctant to grant summary judgment at this stage of the proceedings and on this record.

EXCESS ITEMS/STOCKPILE

The following clause is central to the stockpile shoulder rock claim. It provides:

> 105.05 Rights in & Use of Materials Found or Produced on the Work
>
> (a) With the written approval of the CO, suitable stone, gravel, sand or other material found in the excavation can be used on the project. Payment will be made both for the excavation of such materials at the corresponding contract unit price and for pay items for which the excavated material is used. Replace, without additional compensation, sufficient suitable materials to complete the portion of the work that was originally contemplated to be constructed with such material
>
> (b) Materials produced or processed from Government lands in excess of the quantities required for performance of this contract are the property of the government. The government is not liable to make reimbursement for the cost of producing these materials.

It is agreed the shoulder rock line item was not a line item in the initial solicitation. That quantity was initially left out of the contract, but was needed to level the roadway shoulders to the paved surface placed under this contract. The item was initially added in Modification 2, where it was specified as Government furnished aggregate and designated as Item 304(14). The modification set out an estimated quantity of 3,500 cys of material. (AF 142.) Thereafter, the Government issued Modification 3, which increased the total material. Both modifications priced the material in the shoulder at $8.15 per cy. (AF 145, 205.)

According to the FS in its "Material Facts Not in Dispute," at paragraph 15, "The Government was to provide the shoulder rock; an existing government owned stockpile, produced under an earlier contract, and located in the same Government-owned pit, was identified. (AF 163, 195, 206, 284). At paragraph 19, the FS says that, "On its own initiative, Flathead used the stockpile of materials its subcontractor crushed for the contract, instead of any portion of the previously identified government stockpile." (AF 226-27, 253.) According to Appellant, the material covered by the initial modification, Modification 2, was to come from a Government stockpile. However, that changed. As understood by Appellant, due to wet conditions at the quarry which was to be used, a decision was made to use the remaining stockpile of Grading C in lieu of the material at the quarry. As reflected at various points in the record, the FS was aware of the source change and thus was well aware of the source of the additional shoulder rock. The Government said that because it considered the material to be surplus, it did not expect to pay for the crushing that had previously occurred. That is quite different than suggesting, it did not know of the source change.

The thrust of the FS position is that once the material used for the shoulder rock was crushed, it belonged to the Government, since it had not been specifically crushed for use as shoulder rock. Therefore, the FS says it should not have to pay. There is no dispute that the contract says that material produced or processed from Government lands in excess of quantities required for the contract are the property of Government and the Government is not responsible for making reimbursement of the costs of producing the materials. The material in issue, the Grading C material, was produced or processed from Government land. Where the parties differ is in how to apply the wording "required for the contract." Put simply, the FS position is that because the rock was initially not crushed for use as shoulder rock and if not used, would have remained FS property. Flathead's position is that since the material was used for the shoulder the material was not in excess of that required for the contract and thus Appellant should be paid.

The Appellant has acknowledged that the use of the already crushed material was done for the benefit of both the Government and the contractor. Mr. Mann stated that he believed it is reasonable to recognize that Flathead could have used the Government furnished material up to the quantity available and accordingly does not claim for that. He says, however, that Flathead should recover the material cost on the quantity that exceeded the Government furnished aggregate.

In addition to the above, Flathead states that the record shows that negotiations preceded the modification to haul and place shoulder rock and included discussions of selling the Government additional rock. Flathead directs us to the Motion for Summary Judgment at p. 18, where the FS

says, "During the initial discussions of modifying the contract to include payment for placement of shoulder rock, Flathead inquired about selling additional rock to the Government." (AF 167.) The Government rejected the opportunity to pay contractor to produce the shoulder rock by designating a Government source for use for shoulder rock. (See AF 163.) What the foregoing shows is that when the material was to come from a FS source which was already crushed, there was no expectation of payment. The matter of how that changed, once the source was no longer viable, is a matter that needs to be established on the record and could well shed light on the parties' understanding and expectations as to payment for the shoulder rock.

At this stage of the proceeding, we can read the wording in dispute as to the shoulder rock in more than one way. How it is read, depends upon what weight we give to various acts and how we see the arguments in light of the surrounding circumstances. Given the status of the competing interpretations, summary judgment is not appropriate.

RULING

The FS Motion is denied on all issues.

_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
CANDIDA STEEL
Administrative Judge

VERGILIO, Administrative Judge, dissenting.

I respectfully dissent in part from the decision of the majority in AGBCA No. 2005-130-1, and dissent from their decision in AGBCA No. 2005-131-1. The majority seeks extrinsic evidence to interpret contract provisions, and relies upon assertions of disputed facts raised by the contractor, although the contractor has made no substantive proffer of proof in support of its allegations.

By decision dated January 25, 2005, the contracting officer denied the claims of the contractor to recover $57,673. After subsequent revised submissions for relief to the contracting officer, the contractor submitted a notice of appeal to this Board. The contractor states that it is appealing the decision of the contracting officer dated January 25, 2005, denying claims A and B (these references

are to its post-decisional revisions, which are said to be based upon actual, not estimated, costs). In its complaint, the contractor seeks to recover $52,804.

As docketed, AGBCA No. 05-130-1 relates to two line items, each to be paid as a designed quantities (DQ) item. "These quantities denote the final number of units to be paid for under the terms of the contract." Changes in the number of units may be authorized if errors in the original design "cause a PAY ITEM quantity to change by 15 percent or more" or because of changes in the work authorized. For the first line item, the contract specifies a designed quantity of 872 cy (cubic yards), for which the Government accepted the contractor's unit price of $91 per cy. The parties agree that errors existed in the original design and that the actual figure is 1538 cy. Relying upon the contract clause that states that the Government will authorize a change to the designed quantity for errors that result in a change in quantity "by 15 percent or more," the Government has paid the contractor at the unit price for 1407 cy (the designed quantity of 872 cy plus 535 cy, the amount above 115% of the designed quantity). The Government has denied payment for 131 cy (15% of the designed quantity), reading the clause as limiting relief to quantities only at or above 115% of the designed quantity. Further, deeming the unit price to be fixed under the contract, the Government has denied the request for an increase in the unit price for the quantities in excess of the designed quantity. The contractor here pursues relief for the 131 cy (representing 15% of the designed quantity) at the unit price plus a mark-up said to reflect actual costs, and a similar mark-up on the 535 cy. It seeks a total payment of $20,066. The existing record does not support the Government's motion, the requested interpretation of the contract, or the denial of the claim.

For the second line item, the contractor seeks an additional $7,118. As signed, the contract specifies a designed quantity of 8,287 cy and a unit price of $16.67 per cy. In its claim to the contracting officer and in its complaint, the contractor seeks relief regarding this line item, focusing upon 698 cy, which it states was the designed quantity for a wall section that required an actual quantity of 1,230 cy. Relief is sought for "the quantity in excess of 115% of the 698 c.y. DQ in the Wall section (698 * 1.15 = 803) and the actual quantity of 1,230 c.y. - 803 c.y. = 427 c.y. @ $16.67 [=] $7,118." The contractor attributes the overrun of this line item to an error in the original design, and maintains that it is entitled to relief under the Changes clause because of defective specifications. In denying the claim, the Government determined that errors in the original design existed, but that the errors caused the line item quantity to change 14.8% (that is, less than 15%), such that relief is not available under the clause; unlike the contractor, the Government deems the variation in a component of the line item as not controlling under the clause. The existing record does not support the reasonableness of the contractor's interpretation or the request for relief.

As docketed, AGBCA No. 05-131-1 contains a single component. The contractor seeks $25,620, a cost which it maintains reflects costs of crushing aggregate used for shoulder rock. The Government maintains that the contractor produced this aggregate as surplusage in the performance of other aspects of the contract (for which the contractor has been paid). The Government concludes that, because it retains ownership in this aggregate, it would be improper to pay the contractor additionally for its production or use. The contractor has not identified a substantive basis to dispute

the asserted facts. Legally, the contractor has failed to establish a basis for the requested compensation.

DISCUSSION

As the majority states regarding summary judgment, it is a given that the moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. At the summary judgment stage, the Board may not make determinations about the credibility of witnesses or the weight of the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, it is also true that "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). A statement found in a brief is in the administrative record but not the evidentiary record. An otherwise unsupported statement in a brief does not create an evidentiary conflict. To preclude the entry of summary judgment, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and on which the non-movant has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. at 317, 322-23, 106 S.Ct. 2548, 2552 (1986). When a motion is made and supported as required in the Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324.

The Government's motion for partial summary judgment is succinct. It focuses upon three provisions in the contract: the designed quantities provision of the Methods of Measurement clause, the Changes clause, and Rights in & Use of Materials Found or Produced on the Work clause.

AGBCA No. 2005-130-1: Designed Quantities

The parties entered into a contract that incorporates a Methods of Measurement clause. One of the identified methods of measurement used for determining final payment is identified as designed quantities. The provision states:

> **(a) Designed Quantities (DQ)**. These quantities denote the final number of units to be paid for under the terms of the contract. They are based upon the original design data available prior to advertising the project. Original design data include the preliminary survey information, design assumptions, calculations, drawings, and the presentation in the contract. Changes in the number of units DESIGNATED IN THE SCHEDULE OF ITEMS may be authorized under any of the following conditions:
>
> (1) Changes in the work authorized by the CO.

> (2) A determination by the CO that errors exist in the original design that cause a PAY ITEM quantity to change by 15 percent or more.
>
> (3) A written request submitted to the CO showing evidence of errors in the original design that cause the quantity of a PAY ITEM to change by 15 percent or more. The evidence must be verifiable and consist of calculations, drawings, or other data that show how the designed quantity is in error.

(Appeal File at 282.) This method of measurement is distinct from others (e.g., staked quantities, actual quantities, and lump sum). This is not a fixed unit price line item for an indefinite quantity as the Government suggests. The designed quantity, as opposed to the actual quantity, method of measurment, indicates that the unit price is agreed upon for the stated designed quantity plus or minus 15% (but not inclusive) if the change is attributable to an identified error.

The Changes clause (AUG 1987), 48 CFR 52.243-4, is part of the contract (Appeal File at 16).

Line item 252(01)

For line item 252(01), Special Rock Embankment, Retaining Wall, the contract specifies a designed quantity of 872 cy, and a unit price of $91.00 (Appeal File at 3). In its motion, the Government asserts that the contracting officer determined that there was an error in the design data used to calculate the quantity. The contracting officer's representative calculated a total quantity of 1538 cy; the contracting officer and contractor agreed that the total quantity used was 1538 cy (Appeal File at 208, 224). The Government has paid the contractor at the unit price for the designed quantity (872 cy) and for the quantity utilized above 115% of the designed quantity (that is, 535 cy), but not for 15% of the designed quantity (131 cy). The contractor seeks payment for the 131 cy at what it claims are its marked up costs, and for the 535 cy at what it claims are its marked up costs less the unit price in the contract. The parties have not identified a dispute regarding these facts.

Now is not the time to renegotiate the contract, an after-the-fact attempt to alter the obligations and risks defined therein. Because it appears to be undisputed that it was only a design error that occurred relating to the retaining wall line item, the Methods of Measurements clause specifies what is to be done. Because, unlike the Changes clause, the Methods of Measurements clause contains no notice requirements, the Government's arguments of untimeliness are not here pertinent.[1]

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[1] Moreover, the Changes clause, paragraph (e), states that the contractor must assert its right to an adjustment under the clause within 30 days after receipt of a written change order. On December 17, 2004, the contracting officer signed what purports to be modification 3; the modification adds 535 cy to the line item. (Appeal File at 144-45 (¶ 14).) The contractor sought a price increase within 30 days of the change.

Particularly as the drafter of the clause, the Government has not substantiated why the designed quantity should not be corrected to eliminate the error. The correct quantity for this line item is 1538 cy. As a result, this line item would be changed to incorporate the correct designed quantity so as to read, in pertinent part, 1538 cy x $91.00/cy = $139,958. The Government has paid the contractor $128,037.00 (= (872 cy + 535 cy) x $91.00/cy); the Government has not paid the contractor for 131 cy.

Regarding the contractor-requested mark-up on the 666 cy in excess of the designed quantity, the Government concludes that the clause requires the unit price to remain fixed when the designed quantity is altered because of Government errors in the original design or calculations of the designed quantity that result in a variation at or above 15% of the designed quantity. The Government has not demonstrated that its interpretation is reasonable; the clause does not explicitly or implicitly state that a unit price must remain fixed when there exists an error in the original design causing a variation of at least 15% of the stated designed quantity. The Methods of Measurement clause addresses the number of units to be utilized for compensation, not the unit price.

Therefore, I resolve this aspect of the motion for summary judgment by concluding that the Government has not established that the contract either absolves it from paying the contractor at the unit price for the 131 cy that reflect a corrected designed quantity or that the contractor is precluded from recovering at a unit price different from that in the contract for the quantities in excess of the designed quantity. Accordingly, I deny this aspect of the Government's motion relating to the given line item. The burden of proof rests with the contractor to support any costs in excess of the identified unit price.

Line item 304(10)A

For pay item 304(10)A, Crushed Aggregate, Type Sub-Base, Grading A, Compaction C, the contract specifies a designed quantity of 8287 cy, and a unit price of $16.67 (Appeal File at 3).

In its claim to the contracting officer, the contractor states:

> The typical section for this wall construction also caused [an] increase in Aggregate Base, Grading A of 533 cubic yards. This item was also a Design Quantity specification and the additional 533 c.y. did not result in an increase of DQ in excess of 115%. However, the DQ specification states, *"Designed Quantities (DQ) ... are based upon the original design data available prior to advertising the project. Original design data include the preliminary survey information, design assumptions, calculations, drawings, and the presentation in the contract."* I performed a detailed takeoff of the Grading A during the bid process and based on the information provided in the plans the DQ represented in the bid documents was confirmed. The majority of this aggregate was used on the roadway as base rock, which could be reasonably quantified from the information presented.

> However, the additional Grading A in the Wall section was directly related to the variation in quantity of the Wall. This increase in quantity was not as presented in the contract and therefore our claim includes the quantity in excess of 115% of the 698 c.y. DQ in the Wall section (698 * 1.15 = 803) and the actual quantity of 1,230 c.y. - 803 c.y. = 427 c.y. @ $16.67 [=] $7,118.

(Appeal File at 222.)

In denying this request for payment, the contracting officer states in the decision underlying this matter:

> A review of the contract performance shows that a CO [contracting officer] authorized change did not occur to Item 304(1)A, nor have you presented evidence supporting an error in design data resulting in an error that caused the pay item to change by 15% or more. I have done a review and as CO I have determined that the DQ of item 304(10)A as stated in Section B, Schedule of Items may not have included the quantity needed for the retaining wall aggregate (1,230 CY). I have also determined that 1,230 CY is 14.8% of the 8,287 CY DC of Item 304(10)A. Based on these facts it is clear that while an error in design data may be present the pay item quantity did not change 15% or more of the DQ therefore no adjustment is authorized under the contract terms and conditions.

(Appeal File at 226.)

By letter dated January 31, 2005, to the contracting officer the contractor commented upon this aspect of the decision:

> Your findings above acknowledge an error in the Schedule of Items which resulted in an increase of 14.8% in the DQ and points out that this does not meet the 15% threshold set forth in the specifications. There was also another error in the design, which was brought to my attention by the COR just prior to placing aggregate base Grading A under item 304(10)A. This was identified under Serial Letter No. 8 on September 10, 2004. Essentially, there was a 2% crown specified along the Stone Wall section of the Snowpark, which would have created a serious safety issue during icy conditions. Correcting this error called for an additional 92 cubic yards of Grading A. Adding this quantity to the 1,230 cubic yards equates to a 15.9% overrun.

(Appeal File at 230.)

In a letter dated February 7, 2005, to the contracting officer, the contractor revised the amount it is seeking as an equitable adjustment. Regarding this item, the contractor repeated the language in its

claim to the contracting officer, not mentioning the statements in its letter of January 31. (Appeal File at 252-53.)

In the complaint, the contractor states:

> As a result of the significant error in DQ for the Retaining Wall, this created an increase in quantity of Item 304(10)A, Aggregate Sub-Base, Grading A, also designated as Designed Quantity. The principal quantity of Grading A was used as Sub-Base for road construction and approximately 7% of the DQ was designated to be placed at the Wall section. Payment for the additional quantity of Grading A was denied by the C.O., since the additional quantity did not exceed 15% of the DQ for Grading A. The overrun of Grading A was a direct result of the error in DQ for the Retaining Wall and as previously noted a defective specification subject to the Changes clause. Non-payment for the additional grading A had a direct impact on the costs incurred to complete the Retaining Wall. This claim is identified as A.2 and totals $7,118.

(Appeal File at 257.) The contractor seeks $7,118. The record provides no basis to conclude that the variation in the designed quantity was due to other than errors in the original design or related calculations; the record provides no basis to conclude that the actual variation was at least 15% of the designed quantity.

In its motion, the Government asserts that the contracting officer determined the alleged changes in quantity are less than 15%, such that the contractor is not entitled to relief under the contract. The contractor treats the designed quantity line item as consisting of separate components (or sub-line items), although it provides no basis for its assertions or assumptions. The contract specifies that the 15% provision is applicable to the pay item quantity, not components of a line item. The contractor's reading lacks support in the contract and the record. The contractor seeks payment for a line item, although its asserted basis for relief has a corrected line item quantity of less than 115% of the designed quantity. The clause directs that no adjustment in the quantity is to occur. The stated designed quantities "denote the final number of units to be paid for under the terms of the contract"; a change in the quantity is not authorized for variations due to errors for variations of less than 15% of the designed quantity. Accordingly, I grant this aspect of the Government's motion for summary relief.

AGBCA No. 2005-131-1: Shoulder Rock

The Government represents that the contract contains the following clause:

> **Rights in & Use of Materials Found or Produced on the Work**
>
> (a) With the written approval of the CO, suitable stone, gravel, sand, or other material found in the excavation can be used on the project.

> Payment will be made both for the excavation of such materials at the corresponding contract unit price and for the pay items for which the excavated materials is used. Replace, without additional compensation, sufficient suitable materials to complete the portion of the work that was originally contemplated to be constructed with such material.
>
> (b) Materials produced or processed from Government lands in excess of the quantities required for performance of this contract are the property of the Government. The Government is not obligated to make reimbursement for the cost of producing these materials.

(Exhibit 5 at 283 (¶ 105.05).) The contractor does not dispute the Government's representation.

Contract modification 2 adds a line item of work and payment (on an actual quantity basis): "304(14).3 Placing aggregate, comp. B. CY in a hauling vehicle. CY @ $8.15/CY = $23,105.25." The bilateral modification was signed on September 16, 2004, with a stated effective date of September 14, 2004. (Appeal File at 142.) The line item calculation is based upon an assumed quantity of 2835 cy (Appeal File at 143). On December 17, 2004, the contracting officer signed what purports to be modification 3; the modification adds 1800 cy to the line item. (Appeal File at 144-45 (¶ 14).) The contractor sought a price increase within 30 days of the change.

The contractor states in its complaint:

> The material was designated as Government furnished and a stockpile of aggregate was identified at the Government's Chase Mountain Pit, in an estimated quantity of 2,500 cubic yards. These facts are not in dispute.
>
> Placement of the Shoulder Rock was performed by our paving subcontractor, Tidewater Contractors, Inc. upon completion of the AC paving. Sufficient quantity of Item 304(10)C, Aggregate Base, Grading C remained at the Chase Mountain Pit, which we had produced for roadway aggregate. This item was also designated as Designed Quantity and the work related to this item had been completed. The Shoulder Rock was furnished entirely from the remaining stockpile of Grading C and the Government furnished stockpile of Shoulder Rock was not used.
>
> . . . .
>
> Except for the Government stockpile for which we have provided credit in our claim, the remaining quantity of shoulder rock was produced by the Contractor from Government lands and was required for performance of this contract. Since performance of the contract had not yet been completed, the material which was actually used in performance of the contract was not excess and therefore should be

> reimbursed by the Government. The C.O. [contracting officer] denied this claim and stated that reimbursement of crushing costs would in fact be double payment of the crushing effort. However, the Government did not pay for the crushing as the Contractor assumed the risk of crushing the quantity required for the performance of this contract and paid accordingly.

(Complaint at 3-4.) The Government does not take issue with material facts referenced. In its motion, the Government contends that the contractor did not crush the utilized rock specifically for the given use; the material was produced as excess from the contractor's overall efforts to perform other aspects of the contract. This assertion finds support in the record. The contractor states in its letter, dated November 29, 2004, to the Government, "As for the shoulder rock issue, I think we all agree that it was most reasonable to use the remaining Grading C for shoulder rock and again I believe this was done for both the convenience of the contractor and the government." (Appeal File at 210.) The contractor also addresses this matter in a letter, dated February 1, 2005, to the Government. The contractor contends that the aggregate was required for the performance of the contract. It also states: "When it was eventually determined that there was excess aggregate, it was used in the performance of the contract." (Appeal File at 240.)

The contractor maintains that it is entitled to payment for converting rock to aggregate that was later used on the contract. The Government maintains that the contractor had already converted the rock to aggregate, which amounted to surplusage under the contract. Further, it notes that there is no separate line item for payment for the creation of the aggregate that the contractor relies upon for relief. Because the contract directs that such surplusage is the property of the Government, the Government maintains that the contractor lacks a contractual basis for relief.

The parties have not revealed a material fact in dispute. The contractor had produced the utilized aggregate as surplusage from efforts in performing other aspects of the contract; the contractor did not create the aggregate for use on the shoulder rock. That extra output was the incidental result of performing other work under the contract, for which the contractor has been paid. Under the referenced clause, the additional crushed material remained the property of the Government, for Government use. The record provides no basis for the Board to conclude that there was an expectation that the contractor would be paid separately for crushing that rock. The contractor has failed to demonstrate a basis to be compensated additionally for converting the rock to aggregate, when those efforts occurred in the course of performance of the contract. Accordingly, the Government is correct that the contractor is not entitled to separate payment for crushing the rock.

CONCLUSION

In AGBCA No. 2005-130-1, I would deny the Government's motion for summary judgment with respect to the contractor's claim under line item 252(01), and I would grant the motion (thereby denying the claim) with respect to the contractor's claim under line item 304(10)A.

In AGBCA No. 2005-131-1, I would grant the Government's motion for summary judgment, thereby denying the contractor's claim.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
January 18, 2006